Global Investigations Review

The Practitioner's Guide to Global Investigations

Volume II: Global Investigations around the World

Third Edition

Editors
Judith Seddon, Eleanor Davison, Christopher J Morvillo, Michael Bowes QC, Luke Tolaini, Ama A Adams, Tara McGrath

2019

The Practitioner's Guide to Global Investigations

Third Edition

Editors:

Judith Seddon

Eleanor Davison

Christopher J Morvillo

Michael Bowes QC

Luke Tolaini

Ama A Adams

Tara McGrath

GIR

Global Investigations Review

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.globalinvestigationsreview.com

Enquiries concerning reproduction should be sent to: gemma.chalk@lbresearch.com.
Enquiries concerning editorial content should be directed to the Publisher:
david.samuels@lbresearch.com

ISBN 978-1-78915-111-4
Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

ALLEN & OVERY LLP

ANAGNOSTOPOULOS

ARCHER & ANGEL

BAKER McKENZIE LLP

BANQUE LOMBARD ODIER & CO LTD

BARCLAYS BANK PLC

BCL SOLICITORS LLP

BDO USA, LLP

BORDEN LADNER GERVAIS LLP

BROWN RUDNICK LLP

BRUNSWICK GROUP LLP

CADWALADER, WICKERSHAM & TAFT LLP

CLIFFORD CHANCE

CLOTH FAIR CHAMBERS

CMS CAMERON McKENNA NABARRO OLSWANG

CORKER BINNING

DEBEVOISE & PLIMPTON LLP

DECHERT LLP

FOUNTAIN COURT CHAMBERS

FOX WILLIAMS LLP

FRESHFIELDS BRUCKHAUS DERINGER

GIBSON, DUNN & CRUTCHER LLP

GOODWIN

GÜN + PARTNERS

HERBERT SMITH FREEHILLS LLP

HL CONSULTORIA EM NEGÓCIOS

HOGAN LOVELLS

KINGSLEY NAPLEY LLP

KNOETZL

LATHAM & WATKINS

MATHESON

NAVACELLE

NOKIA CORPORATION

OUTER TEMPLE CHAMBERS

PINSENT MASONS LLP

QUINN EMANUEL URQUHART & SULLIVAN, LLP

RAJAH & TANN SINGAPORE LLP

RICHARDS KIBBE & ORBE LLP

ROPES & GRAY INTERNATIONAL LLP

RUSSELL McVEAGH

SCHELLENBERG WITTMER LTD

SIMMONS & SIMMONS LLP

SKADDEN, ARPS, SLATE, MEAGHER & FLOM (UK) LLP

SOFUNDE OSAKWE OGUNDIPE & BELGORE

SULLIVAN & CROMWELL LLP

VON WOBESER Y SIERRA, SC

WALDEN MACHT & HARAN LLP

WILLKIE FARR & GALLAGHER (UK) LLP

WILMER CUTLER PICKERING HALE AND DORR LLP

Contents

VOLUME II
GLOBAL INVESTIGATIONS AROUND THE WORLD

1

Introduction to Volume II

Judith Seddon, Eleanor Davison, Christopher J Morvillo, Michael Bowes QC, Luke Tolaini, Ama A Adams and Tara McGrath[1]

Boards and senior executives have never been more concerned that they or their organisation may come under the scrutiny of enforcement authorities. And with good reason. Recent years have seen an upsurge in confidence among enforcement authorities across the globe, which has manifested and led to increased numbers of investigations, fines of unprecedented orders of magnitude and senior executives facing the much more realistic prospect of investigations concerning their own conduct and, in some cases, prosecution, conviction and imprisonment.

In many jurisdictions, the introduction of new offences and changes to the law of corporate criminal liability have provided enforcement authorities with enhanced opportunities to pursue criminal investigations and ultimately to prosecute corporate entities. Coupled to this has been the incentivisation of corporates to co-operate with investigations and provide information to assist authorities in pursuing culpable individuals through negotiated settlements. In some jurisdictions, notably the United States, these are an established feature of the enforcement landscape and are regularly used to bring investigations to a pragmatic conclusion without the commercially destructive consequences prosecution of a corporate entity can bring. In others, such as the United Kingdom and France, legislation enabling corporates to conclude investigations short of prosecution is still comparatively young.

The law relating to criminal and regulatory investigations shows no sign of standing still. Law and practice across the globe has changed, often in response to highly publicised scandals. Relationships between enforcement authorities continue to grow closer, and there is a marked trend in politicians, prosecutors and regulators carefully watching the way other jurisdictions choose to combat corporate crime, to apply the most effective mechanisms in

1 Judith Seddon and Ama A Adams are partners at Ropes & Gray International LLP; Christopher J Morvillo and Luke Tolaini are partners and Tara McGrath is a senior associate at Clifford Chance; Eleanor Davison is a barrister at Fountain Court Chambers; and Michael Bowes QC is a barrister at Outer Temple Chambers.

their own national contexts. Recent examples of changes to legislation in terms of either extending corporate criminal liability or legislating for its resolution through deferred prosecution agreements (or both) include significant changes being made in Singapore, Japan, Canada, Australia and Ireland at the time of writing. A similar trend may be observed in the regulatory sphere through the implementation of individual accountability regimes modelled on or drawing from the UK Senior Managers and Certification Regime in, for example, Hong Kong, Australia and Singapore.

All these macro factors, together with important changes to technical local legislation such as the implementation of the EU General Data Protection Regulation, present numerous, significant challenges to corporates and individuals around the world. Both can quickly find themselves the targets of fast-moving and far-reaching investigations, whose possible outcomes may vary significantly in different jurisdictions.

In Volume II of this Guide, which in the third edition now covers 21 jurisdictions, local experts from national jurisdictions respond to a common set of questions designed to identify the local – continually evolving – nuances of law and process that practitioners are likely to encounter in responding to the increasing number of cross-border investigations they face.

12

Ireland

Claire McLoughlin, Karen Reynolds and Ciara Dunny[1]

General context and principles

1 Identify the highest-profile corporate investigation under way in your country, describing and commenting on its most noteworthy aspects as it relates to your country.

The investigation into the Irish Bank Resolution Corporation by a Commission of Investigation remains the highest-profile ongoing corporate investigation in Ireland. It is very significant as it is connected to the collapse and subsequent wind-down of Anglo Irish Bank plc, a prominent Irish bank that collapsed in connection with the financial crash. The related trial of certain high-ranking banking executives concerning their conduct before the collapse was the longest criminal trial in the history of the state and resulted in penal sentences, which are rarely imposed in Irish business crime cases. This investigation is one of the most complex ever to have been carried out by the Garda National Economic Crime Bureau (GNECB) and concerns allegations of a €7.2 billion conspiracy to defraud.

It is important for both the subject matter under investigation and the procedural conduct of any similar investigation in the future. In that regard, the Commission of Investigation has published a number of interim reports that have highlighted difficulties in conducting this type of investigation in Ireland, such as duties of confidentiality, privilege and the constitutional rights of persons implicated in the investigation.

A draft order and terms of reference for a Commission of Investigation into the National Asset Management Agency (NAMA) were published by the Irish government and an interim report was published in September 2017. The terms of reference provide for an investigation

1 Claire McLoughlin and Karen Reynolds are partners and Ciara Dunny is a senior associate at Matheson.

into Project Eagle (the name given to NAMA's Northern Ireland property-loans portfolio), which it sold in April 2014 for about €1.6 billion. This was previously the subject of an inquiry in Northern Ireland.

The investigation by the Office of the Director of Corporate Enforcement (ODCE) into Independent News and Media plc (INM), one of Ireland's largest media companies, has been in the media in recent months. The President of the High Court recently granted an application by the ODCE to appoint inspectors to INM.

There has been only a very limited number of applications to appoint inspectors by the High Court. This was the first brought under Section 748 of the Companies Act 2014, which is a relatively new provision but one that is very similar to the legislation under which previous applications were made and which this provision has replaced. The judgment, therefore, provides guidance on the scope of the powers of the High Court. Significantly, the Court clarified that the actions of a director or chairman, even if acting outside their usual authority, will come within the meaning of conducting the 'affairs of the company' for the purposes of a Section 748 application.

The High Court provided a useful analysis of the matters it will take into consideration in exercising its discretion under Section 748, confirming that public interest in ensuring that proper standards of probity and good governance in companies are maintained is one of the primary matters that should be taken into account for any such application. The Court noted that public interest in the circumstances of this case was particularly engaged because of the nature of the company's business, the position it occupies in the Irish media sector and its status as a public company.

The Court also held that another important factor in the exercise of its discretion is the existence, or potential existence, of other statutory investigations into the subject matter of an application. Such investigations do not automatically preclude the appointment of inspectors and the Court will engage in an assessment of the adequacy of those investigations to deal with the issues raised in an application, taking into account matters such as the nature of the powers available to the statutory bodies in question, their power to publish a report and the effect and status of such reports.

An interesting side aspect of the judgment is that it brings renewed focus to an issue that has been occupying headlines for quite some time; specifically, the role of the ODCE and its ability to carry out its enforcement functions effectually. As a result of the Anglo Irish Bank investigation and recent trials, the ODCE has found itself subject to scrutiny as a result of comments made by Judge John Aylmer regarding its investigative process. Against that backdrop, the government, in its Package on White Collar Crime announced in November 2017, committed to re-establish the ODCE as a new independent agency in an effort to enhance the state's corporate law enforcement capacity. Legislative proposals to give effect to this decision are awaited.

In the intervening months, the ODCE has been enhancing its investigative capabilities with key appointments, including the recruitment of a digital forensics specialist, an investigative accountant, two enforcement portfolio managers, and the establishment of a digital forensics laboratory. However, this judgment highlights potential frailties in legislative powers currently available to the ODCE. It served 33 statutory requirements to compel the provision of documents, explanations and assistance during the course of its 15-month investigation. The ODCE had not ascertained sufficient information to enable it to reach a conclusion in

respect of the issues it had identified. The deficiencies in its powers were implicitly acknowledged in the press release issued by the ODCE in the wake of the judgment, which noted that 'a point was reached where, in the ODCE's assessment, the further progression of this investigation necessitated the deployment of more powerful investigative tools reserved by law to High Court inspectors'.

It will be interesting to see whether this renewed focus on white-collar crime will provide the impetus to get the legislative proposals for enhanced powers published this year. According to the government's legislation programme for autumn/winter 2018, the heads of the Companies (Corporate Enforcement Authority) Bill, which will provide for the restructuring of the ODCE, were under preparation by the Department of Business, Enterprise and Innovation at the time of publication of the programme in September 2018. The General Scheme of the Bill has not materialised; however, the government's legislative programme for autumn/winter 2018 suggests this Bill is expected to undergo pre-legislative scrutiny by the end of 2018.

2 Outline the legal framework for corporate liability in your country.

Corporations are separate legal entities and a company can be found liable for the criminal acts of its officers. Section 18(c) of the Interpretation Act 2005 provides that the term 'person' when used in legislation includes a corporate, unless otherwise specified. Companies can also be vicariously liable for the conduct of employees. Where the doctrine of vicarious liability does not apply, the state of mind of an employee can be attributed to the company in circumstances in which the human agent is the 'directing mind and will' of the company, or when an individual's conduct can be attributed to the company under the particular rule under construction. A company can also be guilty of a strict liability offence, which is an offence that does not require any natural person to have acted with a guilty mind, such as health and safety legislation infringements. Since its commencement on 30 July 2018, this is now also an offence under the Criminal Justice (Corruption Offences) Act 2018.

3 In your country, what law enforcement authorities regulate corporations? How is jurisdiction between the authorities allocated? Do the authorities have policies relating to the prosecution of corporations?

An Garda Síochana (the Irish police) is the primary body for the investigation and prosecution of crime in Ireland, with a specialised wing for complex fraud-type offences (the GNECB). There are also a number of regulatory bodies with a separate specific remit to investigate and enforce corporate crime. These types of investigations are often carried out with the assistance of the police. The regulatory bodies include:

- the ODCE, which monitors and prosecutes violations of company law;
- the Office of the Revenue Commissioners (the Revenue Commissioners), which is responsible for the collection, monitoring and enforcement of tax laws;
- the Competition and Consumer Protection Commission (CCPC), which is responsible for competition law and consumer protection;
- the Central Bank of Ireland, which regulates financial institutions;

- the Health and Safety Authority, which enforces occupational health and safety law; and
- the Office of the Data Protection Commission (ODPC), which is responsible for data protection law.

In terms of prosecution, offences are divided between summary (minor) offences and indictable (serious) offences. In general, regulatory bodies, such as those listed above, are authorised to prosecute summary offences directly. The Office of the Director of Public Prosecutions (DPP) is the relevant body for the prosecution of criminal offences on indictment, or for prosecution of summary offences outside the remit of regulatory bodies. The DPP has no investigative functions; the relevant investigating body prepares a file and submits it to the DPP for consideration. It is then solely at the discretion of the DPP as to whether a case will be taken.

4 What grounds must the authorities in your country have to initiate an investigation? Is a certain threshold of suspicion necessary to trigger an investigation?

This will depend on the statutory basis for that investigation. For the most part, investigations are initiated on the basis of a complaint alleging that an offence has been committed. Some bodies (such as the Standards in Public Office Commission) can only initiate investigations following receipt of a complaint alleging that an offence has been committed, whereas others, such as the ODPC, can also initiate investigations on their own initiative. Different bodies use different factors to consider whether to initiate an investigation into a specific matter. For example, the GNECB has stated that it will assess whether or not to investigate a complaint on the basis of different factors, such as the monetary loss involved, the international dimension to the complaint and the complexity of the issues of law or procedure that arise.

5 Does double jeopardy, or a similar concept, apply to prevent a corporation from facing criminal exposure in your country after it resolves charges on the same core set of facts in another country?

The long-established principle of double jeopardy applies in Ireland. A corporation cannot be prosecuted twice for the same or similar offences on the same facts following a legitimate acquittal or conviction by an Irish court or by a court of competent authority in a foreign jurisdiction. There must be identity between the foreign and domestic offences. It is possible for the same course of conduct in an international setting to give rise to multiple separate offences in different jurisdictions.

The fact that a corporation entered into a deferred prosecution agreement (DPA) in a different country is unlikely to prevent prosecution in Ireland, which does not provide for the use of DPAs, unless the DPA was viewed as being equivalent to an acquittal or conviction.

Typically, the principle does not apply until proceedings are concluded. However, under the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (as amended), no proceedings may be initiated in circumstances where an individual has been charged under that Act in the absence of consent from the DPP.

6 Does criminal law have general extraterritorial effect in your country? To the extent that extraterritorial effect is limited to specific offences, describe those which have extraterritorial effect, the statutory basis and any conditions that must be met for extraterritoriality to apply.

In general, Ireland does not assert extraterritorial jurisdiction in respect of acts conducted outside the jurisdiction. However, extraterritorial jurisdiction is conferred by statute in respect of specific offences to varying degrees. For instance, Section 4 of the Competition Act 2002 provides that it is an offence to be party to an anticompetitive agreement that has the effect of preventing, restricting or distorting competition in trade in goods or services within the state. Importantly, Section 4 is not restricted to agreements made within Ireland.

Examples of specific offences for which Ireland exercises extraterritorial jurisdiction are as follows.

Corruption

The Criminal Justice (Corruption Offences) Act 2018 prohibits bribery offences occurring outside Ireland in two sets of circumstances: (1) if an Irish person or company does something outside Ireland that, if done within Ireland, would constitute an offence under the corruption legislation, that person is liable as if the offence had been committed in Ireland; and (2) if an offence under the corruption legislation takes place partly in Ireland and partly in a foreign jurisdiction, a person may be tried in Ireland for that offence. There is no requirement that the offending act should also be an offence in the foreign jurisdiction where the offending act took place. To date there have been no prosecutions in Ireland under these extraterritorial provisions.

Money laundering

The Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (as amended) (the CJ(MLTF) Act) sets out specific circumstances in which an action can be taken for money laundering occurring outside Ireland. If an individual or a company engages in conduct in a foreign jurisdiction that would constitute a money laundering offence both under the CJ(MLTF) Act and in that foreign jurisdiction, they can be prosecuted in Ireland. This extraterritorial jurisdiction may only be exercised if the individual is an Irish citizen, ordinarily resident in the state, or the body corporate is established by the state or registered under the Companies Act 2014.

The Proceeds of Crime Acts

Under the Proceeds of Crime Act 1996–2005 (the PCA Acts), the Irish High Court can make orders depriving a defendant of assets that are merely suspected of being the proceeds of crime, regardless of whether the defendant has been convicted of a criminal offence. The standard of proof required to determine any question arising under the PCA Acts is that applicable to civil proceedings. 'Property' in relation to the proceeds of crime is broadly defined and includes money and all other property, real or personal. 'Proceeds of crime' for the purposes of the PCA Acts means any property obtained or received at any time by, or as a result of, or in connection with criminal conduct. The definition of 'criminal conduct' is such that foreign criminality is covered by the scope of the act where the proceeds are within

the state. Therefore, the legislation has extraterritorial effect when (1) the criminal conduct occurred outside the state, but the respondent and the property are situated within the state, provided that the conduct constituting the offence is also an offence in the foreign state, (2) the respondent is situated within the state and the criminal conduct occurred outside the state and the property is located outside the state, or (3) the property is located within the state, the respondent is situated outside the state and the criminal conduct occurred outside the state, provided that the conduct constituting the offence is also an offence in the foreign jurisdiction.

7 Describe the principal challenges in your country that arise in cross-border investigations, and explain whether and how such challenges are dependent on other countries involved.

Cross-border investigations, whether by law enforcement, regulators or internal investigations by companies, pose challenges in every jurisdiction for practical, political and legal reasons. For investigations by Irish regulators and law enforcement agencies, the foremost consideration will be whether there is an existing framework for co-operation between Ireland and the other jurisdiction or jurisdictions. The Criminal Justice (Mutual Assistance) Act 2008, as amended, is the primary piece of legislation governing mutual legal assistance between Ireland and other countries. The extent of available co-operation under mutual legal assistance procedures is dependent on the identity of the corresponding state, and the greatest level of co-operation is among other EU Member States. Co-operation with third countries (i.e., those outside the European Economic Area) is dependent on their ratification of relevant international agreements or the existence of a mutual assistance treaty agreed between them. Regulators and law enforcement can co-operate with their counterparts outside these formal procedures, and this will depend on the relationships between such bodies.

Investigations by regulators or law enforcement and by corporations can also encounter difficulties owing to different legal standards. For example, data protection laws in some countries can restrict the flow of information out of the country, and different levels of protection for private data may restrict the possibility of transfer between the jurisdictions. Further, different rules can apply to matters such as the application of privilege and the constitutional protections owed to persons under investigation.

8 What bearing do the decisions of foreign authorities have on an investigation of the same matter in your country?

Investigations into similar matters in other jurisdictions are often the catalyst for investigations in Ireland. Irish authorities will usually try to co-operate with foreign investigation authorities, and the exchange of information through appropriate channels can aid an investigation greatly. Irish investigatory authorities will take notice of decisions made by foreign investigatory authorities, but the weight given to such a decision will vary depending on factors such as the similarity of the facts under investigation and the jurisdiction concerned. Ultimately, it will be a matter for the Irish authorities to determine whether and how to conduct their own investigations, and prosecutions and enforcement actions in other jurisdictions will at most be one of a number of factors considered.

9 Do your country's law enforcement authorities have regard to corporate culture in assessing a company's liability for misconduct?

Corporate culture can be relevant to considerations of proportionality. Authorities may not pursue a corporate prosecution if the conduct was of a 'lone wolf' individual and otherwise went against the corporate culture. It can also be a mitigating factor at sentencing. However, there are no strict rules and ultimately an ethical corporate culture will not block a prosecution for corporate misconduct.

The Central Bank of Ireland (CBI) supervises and enforces compliance with financial services legislation by regulating financial services entities, and has power under the relevant legislation to conduct investigations into financial services entities. Ensuring a good corporate culture of compliance is high on the list of priorities for the CBI and is taken into account in reaching determinations and assessing penalties.

10 What are the top priorities for your country's law enforcement authorities?

Each of the regulatory authorities listed in question 3 is concerned with the monitoring and supervision of activities within its competence. For example, the ODPC will be concerned with data protection, while the Revenue Commissioners deal primarily with tax offences.

Regulatory bodies typically publish their enforcement priorities annually. The CBI's priorities include, among other things, outsourcing by financial firms, MiFID implementation, fintech, conduct, behaviour and culture of regulated entities, anti-money laundering and counter-terrorism financing compliance, while the ODPC and the CBI have both stated a current focus on cybersecurity.

As mentioned in question 1, the Irish government has a specific renewed focus on tackling white-collar crime. A key part of its efforts in this space was the Criminal Justice (Corruption Offences) Act 2018, which came into force on 30 July 2018. Government plans also include establishing the ODCE as an independent company law compliance and enforcement agency, with the ability to recruit and enlist expert staff, and piloting a Joint-Agency Task Force to tackle white-collar crime. The government also intends to enact the Criminal Procedure Bill, the aim of which is to streamline criminal procedures to enhance the efficiency of criminal trials.

11 How are internal investigations viewed by local enforcement bodies in your country?

Internal investigations are considered part of good corporate governance. However, companies operating in Ireland can be subject to certain reporting obligations in respect of certain offences and will therefore be required to notify matters to law enforcement or regulators in certain circumstances (see question 40).

The Irish High Court ruled in *Mooney v. An Post* (1998) 4 IR 288 that the acquittal of an employee of criminal charges does not preclude employers from considering whether an employee should be dismissed on the basis of the impugned conduct. However, if criminal prosecution precedes an internal investigation, in general, internal disciplinary procedures are suspended to respect the individual's right to silence.

Before an internal investigation

12 How do allegations of misconduct most often come to light in companies in your country?

- Allegations of misconduct will often by raised by whistleblowers, who are protected by the Protected Disclosures Act 2014. Accordingly, great care must be taken not to violate these protections when allegations come to light in this way. Under the Central Bank Act (Supervision and Enforcement) Act 2013, there are specific whistleblower protections in relation to making disclosures to the CBI when breaches of financial services legislation may be in issue.
- Thematic reviews are typically carried out by regulators. By the time an allegation of misconduct has arisen on a thematic review or as a result of any other regulatory oversight, the company may not be able to remedy the matter or otherwise prevent an investigation or enforcement action. For example, the CBI often bases its investigations on the Administrative Sanction Procedure under the Central Bank Act 1942 (as amended) on matters identified during thematic reviews.
- When allegations arise through media reports, publicised litigation or other publicised external sources, there are more immediate public relations risks than when a matter arises internally. Companies should consider engaging a public relations agency if there are significant reputational risks attached to any allegation of misconduct.
- There are specific legislative provisions that oblige persons to report information in relation to certain offences in certain circumstances. Following *Sweeney v. Ireland* [2017] IEHC 207, the enforceability of Section 19 of the Criminal Justice Act 2011 may be susceptible to constitutional challenge; however, at present at least, it remains the law in Ireland. If a company is a regulated entity, it may be required to make certain disclosures to its regulator, or indeed to self-report unintentional breaches or offences. Auditors have disclosure obligations, and misconduct coming to light during their engagement may trigger a reporting obligation.
- There is political appetite to ensure Ireland remains an attractive location in which to do business. The introduction of the 'corporate offence' in the Criminal Justice (Corruption Offences) Act 2018 enables a corporate body to be held liable for the corrupt actions committed for its benefit by any director, manager, secretary, employee, agent or subsidiary. The single defence available to corporates for this offence is demonstrating that the company took 'all reasonable steps and exercised all due diligence' to avoid the offence being committed. Although there is no Irish guidance on the legislation yet, 'reasonable steps' could include ensuring measures are taken to promote and ensure a corporate culture of reporting suspicions or concerns in relation to corruption and that any suspicions or concerns are notified and, where appropriate, reported to the relevant authorities.

13 Does your country have a data protection regime?

Ireland's data protection regime mainly comprises the General Data Protection Regulation (Regulation (EU) 2016/679) (GDPR) and the Data Protection Acts 1988–2018 (the DP Acts). Within this regime, there are a number of duties on data controllers, including an obligation to process personal data (under the meaning of the GDPR and the DP Acts) fairly, for it to be kept up to date and secure.

Additionally, the Criminal Justice (Offences Relating to Information Systems) Act 2017 (enacted on 24 May 2017) gives effect to provisions of Directive 2013/40/EU on attacks against information systems. The Act introduced a number of criminal offences, including:

- unauthorised access of information systems;
- interference with information systems or with data on such systems;
- interception of the transmission of data to or from information systems; and
- the use of tools to facilitate the commission of these offences.

14 How is the data protection regime enforced?

The ODPC is responsible for monitoring the application of the DP Acts and the GDPR to protect the rights and freedoms of individuals in relation to processing.

The ODPC has a number of investigative powers, including the power to conduct an audit, the power to compel individuals and companies to provide it with information and documentation, and the power to prohibit the transfer of personal data overseas. Under Section 30 of the DP Acts, the ODPC may bring summary proceedings for an offence and may prosecute offences under SI 336 of 2011 (the Electronic Communications Regulations).

In relation to indictable offences, the ODPC prepares a file and submits it to the DPP for consideration; it is then solely at the discretion of the DPP as to whether a case will be taken in respect of a suspected offence.

15 Are there any data protection issues that cause particular concern in internal investigations in your country?

The GDPR and the DP Acts restrict the use and disclosure of an individual's data in Ireland. There are exceptions to the protection given under the DP Acts, but there is no specific exemption when an internal investigation is being carried out. Therefore all the rules and protections regarding personal data, as set out in the DP Acts, must be followed during an internal investigation. Traditionally, companies have relied upon consent to support internal investigations; however, the DP Acts now require that consent be freely given in order to be valid. In the context of employment, there is an inherent imbalance of power between employee and employer. In addition, the GDPR requires that a data subject can withdraw his or her consent at any time. These factors makes it difficult for employers, in the majority of circumstances, to rely upon consent as a legal basis for processing data, albeit not impossible.

Companies should therefore seek an alternative lawful basis for processing in the context of internal investigations. The DP Acts allow for data to be processed if it is necessary for the purposes of legitimate interests pursued by the data controller, which can be the case for an internal investigation, but that needs to be balanced against the fundamental rights and freedoms and the legitimate interests of the data subject in question.

Organisations do have a legitimate interest in protecting their business, reputation, resources and equipment. However, Irish law recognises a broad 'right to privacy', which includes a right to privacy at work, and a person does not lose privacy and data protection rights simply by being an employee. Any limitation of an employee's right to privacy should be proportionate to the likely damage to the employer's legitimate interests.

If an employer seeks to use 'legitimate interests' as the basis for processing data, an employee as data subject will have a right to object to that processing of their data. This right

is not absolute and may be overridden by the employer having 'compelling reasons' to process the data. The severity of the suspected offence will therefore affect the employer's ability to satisfy this requirement. Companies should also ensure that this balancing exercise between the legitimate interests of the company and those of the employee be carried out prior to conducting the internal investigation, and information in respect of any such exercise should be made available to employees.

In any event, companies must inform their employees of the right to object and should draft an internal investigation policy reflecting this balance. Employees should be notified of the possibility that an investigation might take place and, in particular, the ways in which their personal data might be processed in the context of an investigation. For new employees, this information should be provided when they join the company. However, for existing employees, the provision of an updated internal investigation policy will be sufficient.

16 Are search warrants or dawn raids on companies a feature of law enforcement in your country? Describe any legal limitations on authorities executing search warrants or dawn raids, and what redress the company has if those limits are exceeded.

Search warrants and dawn raids are often used as part of investigations against companies, particularly by the CCPC and the ODCE. Both company premises and private homes of relevant persons can be searched on the basis of an appropriate warrant.

There are constitutional protections for persons subject to searches, particularly of private homes. Depending on the specific statute, a regulator or investigatory body would obtain a search warrant to enter a dwelling to conduct a search and to seize documents. There is a general requirement that there is some nexus between the investigation by the regulatory body of the offence in question and the dwelling in question. The body is only permitted to search the premises specified in the warrant and to seize items coming within the terms of the warrant.

Evidence seized outside the scope of a search warrant may, depending on the circumstances, be inadmissible at trial.

17 How can privileged material be lawfully protected from seizure during a dawn raid or in response to a search warrant in your country?

Privileged material is *prima facie* protected from examination by law enforcement or regulatory bodies. Specific statutes, such as the Companies Act 2014 and the Central Bank (Supervision and Enforcement) Act 2013, also provide for the protection of privileged information during investigations.

In practical terms, it can be difficult to determine during a seizure operation whether material is privileged, and sometimes the material will be isolated so that a claim of privilege can be assessed later.

The mechanism to assess whether privilege has been properly asserted will be dependent on the legislation under which the search warrant was granted. For example, the Competition and Consumer Protection Act 2014 provides a mechanism whereby material that is seized, and is claimed to be legally privileged, is retained and vetted by an independent assessor to determine whether privilege has been properly asserted.

18 Are there any privileges in your country that would prevent an individual or company from providing testimony? Under what circumstances may an individual's testimony be compelled in your country? What consequences flow in your country from such compelled testimony?

The Irish Constitution recognises a right to silence and the privilege against self-incrimination. Arrested suspects are brought into police custody for questioning 'under caution'. The suspect should be cautioned that they have the right to maintain silence and that anything they say may be used in evidence. However, the Criminal Justice Act 1984 (as amended) provides that, in the case of arrestable offences (i.e., those for which a person can be imprisoned for five years or more), inferences can be drawn at trial from an accused's silence.

The right to silence can be abridged by statute, most often in the context of regulatory investigations, meaning that answers can be compelled. However, Irish courts have frequently held that statements given under statutory compulsion (such as in connection with a regulatory investigation attracting a civil penalty) cannot be used against that person in subsequent criminal proceedings, whereas voluntary statements can be.

19 What legal protections are in place for whistleblowers in your country?

The Protected Disclosures Act 2014 protects whistleblowers. When a worker makes a protected disclosure, the employer in question is prevented from dismissing or penalising the worker, taking an action for damages or an action arising under criminal law, or disclosing any information that might identify the person who made the disclosure. Further, the Act creates a cause of action in tort for the worker for detriment suffered as a result of making a protected disclosure. The definitions of 'protected disclosure', 'relevant wrongdoing' and 'worker' are quite broad and care should be taken to consider whether the Act applies in every case of reported misconduct.

20 What rights do employees possess under local employment law that determine how they are treated within a company if their conduct is within the scope of an investigation? What employment rights would attach if they are deemed to have engaged in misconduct? Does it differ for officers and directors of the company?

As a general matter, employees have a constitutional right to 'fair procedures' in any investigative or disciplinary process. This means that, among other things, the employee must be kept appraised of the investigation and must be permitted to participate in the investigation and make points in their defence. The extent and scope of fair procedures and natural justice that must be afforded during a workplace investigation depends on the actual nature of the investigation and the potential consequences thereof.

The following specific protections may arise in the context of conduct-related investigations and dismissals:

- Unfair dismissal. In general, an employee with one year of continuous service may bring a claim for unfair dismissal. An employer cannot lawfully dismiss an employee unless substantial grounds exist to justify termination, such as the employee's conduct. Regard will also be given to the reasonableness of the employer's conduct and the extent of any failure to adhere to agreed procedures. A preliminary investigation is an essential precursor to a fair disciplinary process.

- Discrimination. Irrespective of length of service, an employee may bring a claim for discriminatory dismissal or discrimination based on any one of the nine discriminatory grounds contrary to equality legislation (i.e., gender, civil status, family status, sexual orientation, religion, age, disability, race (including colour, nationality and ethnic or national origin) and membership of the traveller community).
- Whistleblowing. See question 19.
- Wrongful dismissal or High Court injunction. An employee can seek a High Court injunction to restrain an employer from implementing a dismissal if the decision is not implemented correctly. An injunction maintains the *status quo* pending the determination of an overarching breach of contract claim. A similar order may also be brought to restrain an investigation or disciplinary hearing before matters even reach the dismissal stage. A challenge may be based on corporate governance grounds, the fairness of the procedures adopted or failure to terminate the contract in accordance with its terms.

To fairly dismiss for out-of-work misconduct, there must be a genuine connection between the employee's offence and his or her employment. The connection must be such that it leads to a breach of trust or causes reputational or other damage to the employer. The rights do not differ for officers and directors who are employees.

21 Are there disciplinary or other steps that a company must take in your country when an employee is implicated or suspected of misconduct, such as suspension or in relation to compensation? Can an employee be dismissed for refusing to participate in an internal investigation?

The disciplinary process should, at a minimum, follow the Workplace Relations Commission's Code of Practice on Disciplinary and Grievance Procedures, the employer's own procedures and involve the basic principles set out below.

- Advance written notice of any allegations, and any supporting documentation and witness statements, should be provided to the employee.
- The employee should be invited, in writing, to an investigation meeting to discuss the allegations and to put forward his or her response.
- The investigation should go no further than to determine whether there is a sufficient factual basis to warrant a matter being put to disciplinary hearing.
- Suspension should only be imposed after full consideration of the necessity for it pending a full investigation of matters. It may be justified if it is to prevent repetition of the conduct complained of or interference with evidence; to protect individuals at risk from such conduct; to comply with any regulatory rule applicable to the individual or their role; or to protect the employer's business and reputation. Suspension must be for no longer than is reasonably necessary and on full pay and benefits.
- Depending on the outcome of an investigation, the employee should be invited in writing to a disciplinary meeting to discuss the allegations and to put forward a response. Documents obtained during the investigation should be provided to the employee.
- The employee should be allowed to bring a colleague or trade union representative to any meetings.
- Any sanction must be proportionate and reasonable in the circumstances and should be confirmed in writing to the employee.

- A right of appeal to someone not previously involved should be provided.
- Unless the allegations are sufficient to constitute gross misconduct, the sanctions should progress from verbal warning to written warning to final written warning to dismissal. Summary dismissal will only be permitted where the circumstances genuinely constitute gross misconduct.

The extent to which an employer may take disciplinary action against an employee for failure to participate in an investigation, up to and including dismissal in accordance with its disciplinary procedure, will depend on the circumstances.

Commencing an internal investigation

22 Is it common practice in your country to prepare a document setting out terms of reference or investigatory scope before commencing an internal investigation? What issues would it cover?

There is no statutory requirement for such a document, but it would be considered general good practice. Depending on the circumstances, it may be useful to detail the purpose and scope of the investigation and to clarify the remit of the investigators' role. Matters to cover might include:

- the structure and methodology of the investigation;
- a definition of the issues to be covered; and
- details of any engagement with legal counsel and related matters concerning privileged material.

If the investigation concerns employees of the company, it should go no further than gathering the relevant information or evidence to determine whether or not there is a sufficient factual basis to put particular allegations at a formal disciplinary hearing. The investigation should be carried out in accordance with any relevant internal procedures and not reach any factual conclusions on the evidence or decide whether the allegations are proved.

23 If an issue comes to light prior to the authorities in your country becoming aware or engaged, what internal steps should a company take? Are there internal steps that a company is legally or ethically required to take?

Depending on the severity of the issue, it would usually be prudent for a business to carry out a certain level of enquiries and investigation. However, a company should take care in carrying out any investigations and in creating any reports, as it is possible that any such documents could be subject to disclosure in any subsequent legal proceedings. A company would not generally be obliged to voluntarily provide the results of such an investigation to the relevant authorities unless it is required under a court order, statute or as part of a self-report. A number of legislative provisions impose a positive obligation on persons (including businesses) to report wrongdoing in certain circumstances (see question 40).

It is also essential, of course, that any wrongdoing is ceased as soon as the company becomes aware of it, and that remedial measures are taken where appropriate. Care should be

taken to preserve evidence of the wrongdoing, as a failure to do so could result in accusations of destruction of evidence, which can itself be an offence under certain legislation, such as pursuant to Section 793 of the Companies Act 2014.

24 At what point must a company in your country publicly disclose the existence of an internal investigation or contact from law enforcement?

Privately owned companies are not required to publicly disclose the existence of internal investigations or contact from law enforcement. There may, of course, be commercial reasons for doing so (or not doing so) in any particular case.

Under the Irish Listing Rules, publicly listed companies on the Irish Stock Exchange (Euronext Dublin) must, without delay, provide to Euronext Dublin any information that it considers appropriate to protect investors. Euronext Dublin may, at any time, require an issuer to publish such information within the time limits it considers appropriate to protect investors or to ensure the smooth operation of the market.

25 When would management typically brief the board of a company in your country about an internal investigation or contact from law enforcement officials?

This is a matter of corporate governance and will depend on the specific company and the severity of the issue. It would usually be advisable to inform the board of an internal investigation, or contact from law enforcement officials as required, to ensure that appropriate action can be taken. However, care should be taken if there is a possibility that any board members could be conflicted or in a position where they may be a witness or otherwise have knowledge of the relevant matter; in such a case, a subcommittee of the board may be constituted to deal with the matter. Again, this is a matter of corporate governance and will depend on the specific company in each case.

26 What internal steps should a company in your country take if it receives a notice or subpoena from a law enforcement authority seeking the production or preservation of documents or data?

It is advisable to immediately implement a 'document hold' by suspending deletion policies and circulating document retention notices.

The company should review the request and consider the power under which it is exercised, and in particular if the request is voluntary or mandatory. There are risks associated with releasing documentation, particularly when it might contain confidential or personal information, without being lawfully compelled to do so. External legal advice may be required in this regard.

An inventory listing the materials falling within the notice should also be prepared. The material should then be assessed for privilege. Copies of anything provided to the investigation authority should be retained.

27 How can the lawfulness or scope of a notice or subpoena from a law enforcement authority be challenged in your country?

The lawfulness or scope of a notice or subpoena from a law enforcement authority may be challenged in the Irish courts through judicial review proceedings. However, it may be possible to reach a compromise with the law enforcement agency on the scope of the notice. It may also be possible to obtain an interim injunction in certain circumstances preventing the exercise of the notice, subpoena or warrant, or preventing the authority using information already obtained, unless and until the court determines that the validity of the instrument is valid and enforceable.

Attorney–client privilege

28 May attorney–client privilege be claimed over any aspects of internal investigations in your country? What steps should a company take in your country to protect the privilege or confidentiality of an internal investigation?

Any requirement to disclose documents obtained through an internal investigation to the Irish authorities is qualified by legal professional privilege. In Ireland, documentation, including electrical documentation and audio and visual records of communication, may attract legal professional privilege either in the form of legal advice privilege or litigation privilege. Legal advice privilege arises regarding confidential communications between a lawyer and a client that are created for the sole or dominant purpose of giving or seeking legal advice, even if there is no actual or potential litigation. Litigation privilege applies to communications between a lawyer and a client made in the context of contemplated or existing litigation or regulatory action and also covers communications with third parties, such as experts. Litigation privilege can be a broader form of privilege to assert in the context of an internal investigation, provided there is actual or contemplated litigation or regulatory action.

The main way to protect privilege is to involve lawyers in internal investigations at an early stage, although it should be noted that privilege cannot be created regarding existing documents after they have been created merely by involving lawyers. To ensure that existing privilege is not lost, it is important to limit the disclosure or sharing of materials to essential persons only. Legal advice should not be summarised or copied and shared by non-legal persons. If privileged materials need to be shared with third parties, it is important to ensure that appropriate confidentiality agreements are put in place to govern such disclosure and that, as far as possible, privilege is not inadvertently waived or lost.

29 Set out the key principles or elements of the attorney–client privilege in your country as it relates to corporations. Who is the holder of the privilege? Are there any differences when the client is an individual?

Legal professional privilege applies equally to individuals and companies and belongs to the client. See question 28.

30 Does the attorney–client privilege apply equally to in-house and external counsel in your country?

Both in-house and external counsel attract legal professional privilege when the criteria for legal professional privilege are met. However, in the context of the investigation of competition breaches by the European Commission, internal communications with in-house counsel are not considered legally privileged.

31 To what extent is waiver of the attorney–client privilege regarded as a co-operative step in your country? Are there any contexts where privilege waiver is mandatory or required?

Asserting legal professional privilege is a legal right and the fact of its assertion should not be held against a party. However, if the materials regarding which legal professional privilege is being asserted are central to any enforcement investigation (such as a party defending certain conduct on the basis that it was taken following legal advice), it may appear unco-operative to refuse to disclose such material. In such case, disclosure could, in fact, be in a party's strategic interest. Any decision to waive privilege should be carefully considered as, once waived, legal professional privilege is lost. It is generally recommended that a waiver should be limited to those materials strictly necessary and should be made on a limited and specified basis; in other words, a general waiver of all legal professional privilege in respect of a particular matter is not advisable.

32 Does the concept of limited waiver of privilege exist as a concept in your jurisdiction? What is its scope?

It is possible to waive privilege on a limited basis. However, care should be taken as privilege can inadvertently be lost in such circumstances. The scope of the waiver should be clear, limited and in writing; furthermore, it is of utmost importance that confidentiality in the material should be maintained.

33 If privilege has been waived on a limited basis in another country, can privilege be maintained in your own country?

If the waiver of privilege was appropriate, limited and restricted, it should not defeat the overall assertion of legal professional privilege. However, this will depend on the extent and nature of the waiver in each case.

34 Do common interest privileges exist as concepts in your country? What are the requirements and scope?

Common interest privilege does exist in Ireland. It is important that common interest privilege is expressly asserted and that the third party is aware of the necessity of preserving privilege in the materials received, such as by not disclosing it to any other persons outside the common interest circle.

35 Can privilege be claimed over the assistance given by third parties to lawyers?

Third-party communications are only protected against disclosure in the context of litigation privilege. Litigation privilege can be asserted regarding third-party communications where the dominant purpose of the communication is in anticipation of existing or contemplated litigation (which currently includes regulatory proceedings).

Witness interviews

36 Does your country permit the interviewing of witnesses as part of an internal investigation?

Witnesses can be interviewed in internal investigations and are often seen as an integral part of the fact-finding exercise of an investigation. However, the internal investigation would not be able to compel witnesses to attend, except to the extent that employees can be requested to co-operate in the context of their employment.

37 Can the attorney–client privilege be claimed over internal witness interviews or attorney reports in your country?

Reports that contain legal analysis, advice or conclusions, or which are prepared with the dominant purpose of preparing for, or in contemplation of or in connection with litigation or regulatory proceedings, can be protected by legal professional privilege.

38 When conducting a witness interview of an employee in your country, what legal or ethical requirements or guidance must be adhered to? Are there different requirements when interviewing third parties?

It can be important that witnesses are informed of the nature of the interview, whether they are implicated in any wrongdoing and, crucially, of any possible consequences for them of the investigation process to preserve the ability to take appropriate action, if necessary, following or as a result of the investigation. It is important to note that any lawyers present are acting for the company and not for the employee, who may, in some cases, have his or her own legal representation.

Existing employees have a greater right to fair procedures as they are more likely to face the possibility of an adverse outcome, such as dismissal. However, it is best practice to accord equal, fair procedures to all interviewees.

39 How is an internal interview typically conducted in your country? Are documents put to the witness? May or must employees in your country have their own legal representation at the interview?

It is good practice to ensure that any documents of relevance to the witness are put to them. 'Interview by ambush' is contrary to fair procedures and open to challenge, particularly by employees.

Employees have no statutory right to legal representation at witness interviews. However, if the employee or witness is, or may become, the subject of the investigation, the employer should consider advising the employee or witness to have legal representation to minimise the risk of a later legal challenge to the investigation process. If the person requests permission to have legal representation, the company should assess each case separately. It is generally considered prudent to permit such representation, or not to proceed in the absence of such representation.

Reporting to the authorities

40 Are there circumstances under which reporting misconduct to law enforcement authorities is mandatory in your country?

A number of legislative provisions impose a positive obligation on persons (including businesses) to report wrongdoing in certain circumstances. Most significantly, Section 19 of the Criminal Justice Act 2011 provides that a person is guilty of an offence if he or she fails to report information that he or she knows or believes might be of 'material assistance' in preventing the commission of, or securing the prosecution of another person in respect of, certain listed offences, including many corporate crimes. The disclosure must be made 'as soon as practicable', and a person who fails to disclose such information may be liable to a fine or imprisonment for up to five years, or both.

Other mandatory reporting obligations include duties on:

- persons with a 'pre-approved control function' to report breaches of financial services legislation;
- designated persons (auditors, financial institutions, solicitors) to report money laundering offences;
- auditors to report a belief that an indictable offence has been committed;
- auditors or persons preparing accounts to report theft and fraud offences; and
- all persons to report any offence committed against a child.

41 In what circumstances might you advise a company to self-report to law enforcement even if it has no legal obligation to do so? In what circumstances would that advice to self-report extend to countries beyond your country?

A company might be advised to self-report, in Ireland or overseas, to mitigate the risk of prosecution or any potential sentence that may be imposed by a court. There are no express provisions for immunity or leniency in prosecution under Irish law, but self-reporting can be considered a mitigating factor in sentencing. The DPP does have discretion to grant immunity in certain circumstances. Some regulatory regimes, such as the CBI's administrative sanction procedure, also consider self-reporting as a mitigating factor affecting the level of sanctions.

The exception is the Cartel Immunity Programme operated by the CCPC, which allows a member of a cartel to apply for immunity in return for co-operating with the CCPC. Only the first member of a cartel to come forward can avail of the programme and must meet strict eligibility criteria.

In terms of extraterritorial self-reporting, an Irish company may self-report to authorities in other jurisdictions that have immunity or leniency programmes if the conduct in question could also be investigated or prosecuted by those authorities. For example, the European Commission runs a cartel immunity programme and an Irish company may self-report to the Commission to avail of this.

42 What are the practical steps you need to take to self-report to law enforcement in your country?

It is important that a company has considered its risks and, as far as possible, investigated the matter before making a report. A report can be made in writing, such as by letter to the appropriate authority, or by providing a written statement upon attending a Garda station. The form and content of the report will depend on the specific circumstances of the matter, including, for example, whether the company might by implicated, or whether there are other legal, commercial or reputational issues to be considered. Data deletion policies should be suspended and relevant materials retained in case they are subsequently required in the context of an investigation or legal or regulatory proceedings.

Responding to the authorities

43 In practice, how does a company in your country respond to a notice or subpoena from a law enforcement authority? Is it possible to enter into dialogue with the authorities to address their concerns before or even after charges are brought? How?

Dialogue may start with the authority once a notice has been received and analysed. For example, the company may wish to address concerns such as the scope of the request, the legal basis or the deadline for compliance. It is important that care is taken with such communications, as they can set the tone for engagement with the authority and may be relevant for any subsequent court challenge or dispute that may arise.

44 Are ongoing authority investigations subject to challenge before the courts?

Ongoing investigations may be subject to challenge in the courts, for example through an application for judicial review. It is also possible to seek injunctions, typically on an interim basis, to protect legal rights while the underlying challenge is resolved.

45 In the event that authorities in your country and one or more other countries issue separate notices or subpoenas regarding the same facts or allegations, how should the company approach this?

Each request should be treated separately as the legal basis for the request is likely to be different. A request that may appear to compel disclosure of documents may not in fact have legal effect if it is from outside the jurisdiction and the procedures for compelling cross-border information (such as the procedures under the Criminal Justice (Mutual Assistance) Act 2008, as amended (see question 47)) are not engaged. It is generally not advisable to release information, particularly personal data within the meaning of the DP Acts, in the absence of

lawful compulsion. 'Package disclosures' are therefore usually unadvisable, as documents that one agency has a legal right to obtain may not be within the compulsory power of another agency. That said, where requests are made by different authorities, it is important to have a consistent approach with regard to how requests are treated and what arguments are made to authorities.

46 If a notice or subpoena from the authorities in your country seeks production of material relating to a particular matter that crosses borders, must the company search for and produce material in other countries to satisfy the request? What are the difficulties in that regard?

The appropriate response will depend on the nature of the request and the relationship between the company that is subject to the request and the entities holding the documents across borders. If the company in receipt of the request has the power to compel production, such as from a branch or subsidiary, it may be required to do so. However, generally, the entity to which the request is addressed will be the only body with an obligation to respond.

47 Does law enforcement in your country routinely share information or investigative materials with law enforcement in other countries? What framework is in place in your country for co-operation with foreign authorities?

Irish law enforcement and regulatory bodies are known to share information informally with equivalent bodies in different jurisdictions.

In terms of formal procedures, the Criminal Justice (Mutual Assistance) Act 2008 (as amended) is the primary legislation governing formal mutual legal assistance between Ireland and other countries. The extent of available co-operation under mutual legal assistance procedures is dependent on the identity of the corresponding state. The greatest level of co-operation exists between Ireland and other EU Member States. Co-operation with third countries (those outside the European Economic Area) is dependent on their ratification of relevant international agreements or the existence of a mutual assistance treaty agreed between them.

48 Do law enforcement authorities in your country have any confidentiality obligations in relation to information received during an investigation or onward disclosure and use of that information by third parties?

There is no generally applicable statutory obligation that creates an obligation on the police to keep information received during an investigation confidential.

Irish law does recognise a broad 'right to privacy', however, which is protected by the Irish Constitution, the EU Charter of Fundamental Rights and the European Convention on Human Rights. Further, data protection is regulated in Ireland primarily by the DP Acts. Irish data protection laws reflect EU data protection laws and protect the personal data of individuals from disclosure in certain circumstances. The police are subject to the same obligation under the DP Acts as all 'data controllers', within the meaning of the DP Acts, when processing personal data. There are exceptions to the rules set out in the DP Acts, including where the processing is required to investigate or prevent an offence.

The police may disclose information to law officers and other law enforcement agencies during an investigation or on the basis of the prevention and detection of offences, under mutual assistance agreements with Interpol Europe and other agencies that have a statutory investigative and enforcement role.

Whistleblowers are protected from identification by the Protected Disclosures Act 2014. Accordingly, great care must be taken not to violate these protections when an investigation involving whistleblower information is under way. However, the identity of whistleblowers can be disclosed to prevent a crime or to aid in the prosecution of a criminal offence.

49 How would you advise a company that has received a request from a law enforcement authority in your country seeking documents from another country, where production would violate the laws of that other country?

In such circumstances, it would usually be prudent to advise the company not to provide the documents. However, the company should ensure that it is not violating any laws in its own jurisdiction by doing so. The company should inform the requesting authority of the basis for the decision to refuse the request for documents.

50 Does your country have blocking statutes? What related issues are implicated by complying with a notice or subpoena?

Data protection is regulated in Ireland primarily by the DP Acts. Irish data protection laws reflect EU data protection laws and protect the personal data of individuals from disclosure in certain circumstances. The transfer of data outside Ireland is restricted, but there is no outright 'block' preventing all transfers. The main implication of Irish data protection law is that companies may be reluctant to release materials in the absence of a legal obligation.

As discussed in question 15, Irish law also recognises a broad right to privacy, which can restrict the disclosure of data even when the disclosure would comply with the DP Acts.

Further, care should be taken when releasing documents that relate to any type of contractual relationship, as there may be confidentiality terms in the contract or engagement terms that could be violated by the disclosure. A party should always be mindful that if it releases information without being compelled to do so, it is not protected from claims that it has breached Irish data protection legislation or breach of confidence claims.

51 What are the risks in voluntary production versus compelled production of material to authorities in your country? Is this material discoverable by third parties? Is there any confidentiality attached to productions to law enforcement in your country?

As outlined in questions 49 and 50, there are risks attached to voluntary production of documents, and it is generally not advised unless there are compelling reasons to do so. In particular, as noted in question 48, a company may be in breach of the DP Acts if it releases materials that contain personal data in the absence of lawful compulsion, and may also be in breach of confidence if it releases confidential material without being compelled to do so. There may also be other contractual consequences for a company releasing certain materials voluntarily. There is no automatic confidentiality attached to materials disclosed to law enforcement, unless restrictions have been agreed to that effect. Accordingly, material

provided to authorities voluntarily may be shared with other authorities or used for purposes other than the initial basis of the request. Materials obtained on the basis of a compulsory power are subject to greater protections. However, once material is in the possession of an authority, there is nothing to prevent a third party from seeking the material, such as through a non-party discovery order.

Global settlements

52 Prior to any settlement with a law enforcement authority in your country, what considerations should companies be aware of?

Deferred prosecution agreements do not exist in Ireland. It is possible to enter into a settlement with some regulatory authorities in prescribed circumstances. For example, the CBI commonly uses settlements to resolve investigations brought under the Administrative Sanctions Procedure under the Central Bank Act 1942 (as amended) (this is in respect of civil sanctions only). In addition, pursuant to the Cartel Immunity Programme, a settlement may be achieved in specific circumstances.

Generally, any company considering entering into a settlement with a regulatory or enforcement authority should balance the seriousness of the charge, the scope of a conviction and the strength of the case against it, against the terms of the settlement, such as the quantum of any fine and whether there is publicity associated with the settlement. Care should be taken with regard to a settlement under the Cartel Immunity Programme, to ensure that the stringent eligibility criteria are met before engaging with the CCPC.

53 What types of penalties may companies or their directors, officers or employees face for misconduct in your country?

Irish criminal legislation typically provides for monetary fines or terms of imprisonment for offences. Given the nature of corporate entities, which cannot be imprisoned, the most common form of sanction against a corporate entity is a fine. However, while less common, Irish legislation also provides for specific remedies, such as compensation orders and adverse publicity orders under health and safety legislation.

Common sanctions in the context of business crime are restriction and disqualification orders. Under Section 839 of the Companies Act 2014, if a person has been convicted of an indictable offence in relation to a company, or convicted of an offence involving fraud or dishonesty, that person may not be appointed to, or act as, an auditor, director or other officer, receiver, liquidator or examiner or be in any way, whether directly or indirectly, concerned or take part in the promotion, formation or management of any company.

As discussed further under question 56, companies convicted of certain offences may be excluded from participation in public tenders for a specific period.

54 What do the authorities in your country take into account when fixing penalties?

Sentencing of corporate crimes is largely a function for the courts. There is no express provision under Irish law for immunity or leniency in prosecution. If a business is found guilty of an offence, a wide range of factors may be taken into account at the discretion of the court. Mitigating factors include whether the company ceased committing the criminal offence

on detection or whether there were further infringements or complaints; whether remedial efforts to repair the damage caused were used by the company; the existence of a compliance programme; and whether the company itself reported the infringement before it was detected by the prosecuting authority. Additionally, in imposing any sentence, the court must comply with the principle of proportionality as set out in *People (DPP) v. McCormack* [2000] 4 IR 356.

Certain sanctions, such as those available to the CBI under the administrative sanction procedure or the CCPC in connection with cartels, can be expressed as a percentage of turnover. This allows the size of the entity to be considered when penalties are imposed.

55 Are non-prosecution agreements or deferred prosecution agreements available in your jurisdiction for corporations?

Non-prosecution agreements and deferred prosecution agreements are not available in Ireland. There has been some consideration of these types of arrangements at policy level; for example, the Law Reform Commission considered the issue in its 2016 Regulatory Enforcement and Corporate Offences paper.

56 Is there a regime for suspension and debarment from government contracts in your country? Where there is a risk of suspension or debarment or other restrictions on continuing business in your country, what are the options available to a corporate wanting to settle in another country?

The EU Public Sector Procurement Directive (2014/24/EU) was transposed into Irish law by the European Union (Award of Public Authority Contracts) Regulations 2016. Under these Regulations, companies must be excluded from public procurement for a specific period when they have been convicted of certain offences. The Regulations also provide for offences that carry discretionary debarment. These include offences under EU law, meaning that a company should take care when settling charges in another country, as doing so could, depending on the offence, trigger these exclusion rules.

The Regulations enable companies to recover eligibility to bid for public contracts by demonstrating evidence of 'self-cleaning', such as the payment of compensation to the victim, clarification of the facts and circumstances of the offence, co-operation with the investigating authority, and the implementation of appropriate measures to prevent further criminal offences or misconduct.

57 Are 'global' settlements common in your country? What are the practical considerations?

It is possible for a domestic authority to reach a resolution as part of a coordinated approach with an overseas authority. However, if a party wishes to reach a settlement with authorities in another country or countries, it should be aware that such an agreement may not prevent Irish authorities from continuing to pursue a prosecution.

58 Are parallel private actions allowed? May private plaintiffs gain access to the authorities' files?

A defendant may be subject to simultaneous civil and criminal proceedings arising out of the same set of circumstances. There is no obligation on the courts to adjourn the civil proceedings pending the completion of the criminal proceedings. However, civil proceedings are commonly adjourned pending the outcome of the criminal case. As there are different burdens of proof in civil and criminal matters, the outcome of civil and criminal proceedings will not necessarily be the same. It is also possible, although rare, for individuals to initiate private criminal prosecutions by issuing a summons pursuant to the Petty Sessions (Ireland) Act 1851 in certain limited circumstances.

Authorities are not obliged to disclose their files to such persons unless the particular file is generally open to the public or a court order has been obtained.

Publicity and reputational issues

59 Outline the law in your country surrounding publicity of criminal cases at the investigatory stage and once a case is before a court.

The Irish judiciary is extremely protective of the accused's right to a fair trial and will prohibit or stay a trial if necessary. This sometimes occurs in respect of high-profile cases when the extent of publicity affects the ability of the defendant to have a fair jury trial. An example of this is the trial of a high-profile former chairman of Anglo Irish Bank, which was adjourned in October 2015 and initially rescheduled for seven months later, owing to concerns of adverse publicity surrounding the trial.

Reports that undermine legal proceedings can amount to contempt of court. Further, any reporting that goes beyond a faithful account of the court proceedings could give rise to defamation claims.

Pursuant to the Data Protection Act 2018, new court rules have been introduced to allow access to documents on court files. Under these new rules, an accredited member of the press may access documents that are 'opened' in court (i.e., read out in court by a lawyer or by the judge) and those that are 'deemed to have been opened' at a hearing before the court (i.e., documents that the judge has read in chambers and does not require the parties to formally open in court).

60 What steps do you take to manage corporate communications in your country? Is it common for companies to use a public relations firm to manage a corporate crisis in your country?

In larger companies, corporate communications are generally managed by a team of marketing professionals, and it is common for companies to employ public relations companies when there is a risk of negative publicity.

61 How is publicity managed when there are ongoing, related proceedings?

It is important that any public statements issued by a company do not potentially prejudice current criminal proceedings or investigations. Statements issued by a company in such circumstances should be brief, factual and approved by the company's legal advisers. Care should also be taken that no comments are made that potentially identify any persons, as there could be a risk of defamation proceedings if the statement incorrectly implies that the person has committed any wrongdoing.

Duty to the market

62 Is disclosure to the market in circumstances where a settlement has been agreed but not yet made public mandatory?

As discussed in question 24, the Euronext Dublin may require an issuer to publish information within such time limits as it considers appropriate to protect investors or to ensure the smooth operations of the market.

Appendix 1

About the Authors

Claire McLoughlin
Matheson

Claire McLoughlin is a partner in the commercial litigation and dispute resolution department at Matheson and co-head of the firm's regulatory and investigations group.

Claire has advised a wide variety of clients on contentious matters, with a particular focus on the areas of financial services disputes, contractual disputes and corporate offences. Claire has also been involved in a number of judicial review proceedings, acting both for and against statutory bodies.

Claire is highly experienced in advising clients on all aspects of High Court, Commercial Court and Supreme Court litigation. The majority of Claire's cases consist of High Court and Commercial Court litigation matters. In this regard, Claire has developed experience in case management, disclosure and discovery requirements, including privilege and confidentiality issues, the instruction of experts and procedures relating to preliminary issues and modular trials. From a practical perspective, Claire has particular expertise in coordinating and managing large-scale discovery exercises.

Karen Reynolds
Matheson

Karen Reynolds is a partner in the commercial litigation and dispute resolution department at Matheson and co-head of the firm's regulatory and investigations group.

Karen has a broad financial services and commercial dispute resolution practice. She has more than 10 years' experience in providing strategic advice and dispute resolution to financial institutions, financial services providers, domestic and internationally focused companies and regulated entities and persons. She advises clients in relation to contentious regulatory matters, investigations, inquiries, compliance and governance-related matters, white-collar crime and corporate offences, commercial and financial services disputes, anti-corruption and bribery legislation, and document disclosure issues.

Karen has substantial experience in corporate restructuring and insolvency law matters, having had a lead role in some of the most high-profile corporate rescue transactions of the last 10 years. She advises liquidators, regulators, directors and insolvency practitioners in relation to corporate offences and investigations, shareholder rights and remedies, directors' duties, including in relation to fraudulent and reckless trading, and disqualification and restriction proceedings.

Ciara Dunny
Matheson

Ciara Dunny is a senior associate in the regulatory and investigations team within the commercial litigation and dispute resolution practice. She has more than five years' experience in corporate crime and investigations and regularly advises both domestic and international clients on bribery, corruption, fraud, money laundering, investigations and trade sanctions, and related compliance issues. Ciara joined the team in July 2018 from Addleshaw Goddard's London office. Ciara's experience in investigations extends to the United Kingdom, the United States, Europe, China, Korea, the United Arab Emirates and Iran. Ciara also represents clients in large-scale civil litigation, including in relation to civil fraud, product liability, professional negligence and debt recovery. Ciara is recognised as a 'future leader' by *Who's Who Legal: Investigations in Europe* 2018.

Matheson
70 Sir John Rogerson's Quay
Dublin 2
Ireland
Tel: +353 1 232 2000
Fax: +353 1 232 3333
claire.mcloughlin@matheson.com
karen.reynolds@matheson.com
ciara.dunny@matheson.com
www.matheson.com

Visit globalinvestigationsreview.com
Follow @giralerts on Twitter
Find us on LinkedIn

ISBN 978-1-912377-34-3